TANJUNG TERAS SDN BHD v. KERAJAAN MALAYSIA

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
LINTON ALBERT JCA
LIM YEE LAN JCA
[CIVIL APPEAL NO: W-01-134-04-2013]
18 MAY 2015

CONTRACT: *Payment for works done – Agreement – Sale of land and construction of apartments (project) – Principle contractor and sub-contractor – Failure to complete project within time frame – Termination of agreement with principle contractor – Whether sub-contractor could counterclaim for compensation for works done – Quantum meruit – Whether conditions under s. 71 to be compensated for works done satisfied – Whether trial judge erred in interpreting conditions – Principle in Siow Yong Fatt v. Susur Rotan Mining – Whether applicable – Contracts Act 1950, s. 71*

The respondent ('the plaintiff') entered into a sale and purchase agreement ('the agreement') with Jeram Permata ('JP'). In consideration, JP agreed to sell a piece of land and to construct 226 medium cost apartments on the said land ('the project'). A sum of RM16 million was paid to JP by the plaintiff under the agreement, which included the price of the said land. The defendant was appointed by JP as its sub-contractor *vide* a letter of acceptance ('LOA') dated 15 February 2007 to construct the super structure works under the project. There was delay on the part of JP in completing the project and in consequence, the plaintiff issued a letter of termination to JP on 13 July 2007. After the termination of the agreement, the defendant refused to leave the project site. The plaintiff gave notice to the defendant to vacate the project site and further informed the defendant that the plaintiff would not be making any payment to the defendant after the agreement was terminated on 13 July 2007. The defendant refused to vacate the site despite the notice. Therefore, the plaintiff then filed an action against the defendant *vide* an originating summons ('OS') and sought, *inter alia*, for a declaration that it was the owner of the land and was entitled to vacant possession of the land. In opposing the plaintiff's OS, the defendant contended, *inter alia*, that the termination of the agreement between plaintiff and JP was wrongful on the ground that there were representations made that extension of time would be granted to JP to complete the project. It was further alleged by the defendant that the unlawful termination of the agreement had resulted in loss and damage to the defendant as it was not paid a single cent for the work done on the project. The defendant submitted that payment for work done under the LOA was on a back-to-back basis, *ie*, the defendant would be paid only if JP was paid. Therefore, the defendant counterclaimed against the plaintiff for the amount of RM50 million. The High Court granted the prayers in the plaintiff's OS. The OS was also converted into a writ action so that the defendant's

counterclaim for compensation could be determined at a trial. During the trial, the defendant confined its counterclaim against the plaintiff to a sum of RM3,009,254.23 as certified by JP's architect ('DW2') under three interim certificates. The trial judge held that since there was no contractual relationship between the plaintiff and the defendant, the defendant's counterclaim was not a contractual claim but a claim premised on s. 71 of the Contracts Act 1950 ('CA'). The High Court Judge referred to the case of *Siow Yong Fatt v. Susur Rotan Mining* ('*Siow Yong Fatt*'s case) and held that to succeed in a claim under s. 71 of the CA, four conditions had to be met *ie*, the doing of the act or the delivery of the thing must (i) be lawful; (ii) be done for another person; (iii) must not be intended to be done gratuitously; and (iv) must be such that the other person enjoys the benefit of the act or the delivery. The High Court Judge found that the defendant had failed to fulfil condition (ii) and (iv) to successfully establish a claim under s. 71. In regards to quantum, the High Court Judge had similarly found that the defendant had failed to discharge its burden of proving the sum of RM3,009,254.23 and merely relied on the three interim certificates issued by DW2. The High Court Judge further held that the defendant had failed to particularise the works done by the defendant and the particulars of claim in respect of the same. Hence, the present appeal. On appeal, the defendant submitted that the High Court Judge had misconstrued conditions (ii) and (iv). In interpreting the words in condition (ii) 'must be done for another' the trial judge gave undue emphasis to the fact that since the defendant would be paid by JP for the works, therefore the defendant had failed to show that the works were done for the plaintiff. The trial judge erred in failing to give consideration to the fact that whatever works that were done under the project were done for the principal of the project *ie*, the plaintiff in this case. In relation to condition (iv), the trial judge also made an erroneous finding of fact that 'since the works were performed for JP, it is JP who has benefited and not the plaintiff'.

Held (allowing appeal with costs)

Per Lim Yee Lan JCA delivering the judgment of the court:

(1) Section 71 of the CA is the statutory embodiment of the common law principle of *quantum meruit*, which provides for a just compensation as the measure of the work done as opposed to contractual damages. Liability under s. 71 is not based on any existing contract between the parties. Rather, it is based on equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party. The submission that there is no obligation on the part of the plaintiff to pay the defendant for the structure work done because there was no privity of contract between the parties does not hold any water. (paras 31 & 32)

(2) The High Court Judge appeared to have given a very mechanical or narrow interpretation to the second condition. The factual scenario of the present case is very different from the case of *Seow Yong Fatt.* At the time the structure work was done by the defendant, it was in fact done for the plaintiff as the ultimate owner of the project and the plaintiff was the direct beneficiary of the project. The defendant had intended to be paid for carrying the works. The fact that the defendant would receive payment from JP and not the plaintiff did not alter the fact that the defendant never intended the work to be done gratuitously. Therefore, the second condition ought to have been found in favour of the defendant. (para 45)

(3) The defendant was only appointed as a sub-contractor to construct the super structure work while the construction of the entire project was the responsibility of JP. The plaintiff had benefited from the super structure work as the plaintiff had since revived the project and had appointed new contractors to continue to build the apartments on the super structure work done by the defendant. There was no evidence to show that the super structure work done by the defendant was defective and or had to be demolished when the new contractor took over the project. It would be unjust for the plaintiff to refuse to pay any compensation to the defendant for the value of the structure work done. Based on the foregoing, the defendant had successfully proven, on a balance of probabilities, its claim under s. 71 of the CA. (paras 48-53)

(4) The defendant's claim for the sum of RM3,009,245.23 is premised on the three interim certificates certified and issued by DW2, as part of its progress payment claim under the terms of its LOA with the main contractor, JP. A sum certified for interim payment based on contractual terms cannot form the basis of calculation of compensation based on *quantum meruit* in a claim under s. 71 of the CA. However, the court took note that in the three interim certificates, there was a sum of RM1,241,022.56 certified as 'actual physical work done'. The defendant was entitled to claim the said sum as reasonable compensation for the super structure work done on the project site on a *quantum meruit* basis. (paras 60-61)

(5) DW2 had in his testimony stated that the three interim certificates were issued by him after the works were evaluated and verified by JP's quantity surveyor ('DW1'). Both DW1's and DW2's testimony was not seriously challenged by the plaintiff during trial. Hence, it was not as if the sum of RM1,241,022.56 for 'actual physical work done' was a figure plucked from the air by the defendant as alleged by the plaintiff. It was prepared by men skilled in their respective profession and the High Court could accept that they had acted professionally when quantifying and certifying the various amounts stated in the certificate, including the sum of RM1,241,022.56 for physical work done by the defendant. (para 62)

(6) In allowing the defendant's appeal on quantum, the defendant's contention that although a sum of RM16 million had purportedly been paid by the plaintiff to JP under the agreement, it did not include the structure work carried out by the defendant on the project site. The documentary evidence adduced by the plaintiff itself showed that the RM16 million was paid to JP between the period 19 June 2003 to 2 February 2005 whilst the defendant was appointed by JP as its sub-contractor only on 15 February 2007. In other words, the RM16 million paid to JP could not have included payment super structure work which was yet to be done by the defendant at the relevant time. Therefore, the defendant was awarded the sum of RM1,241,022.56. (paras 64 & 65)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('plaintif) telah memeterai perjanjian jual beli ('perjanjian') dengan Jeram Permata ('JP'). Sebagai balasan, JP bersetuju menjual sebidang tanah dan membina 226 pangsapuri kos sederhana di atas tanah tersebut ('projek'). Sejumlah RM16 juta dibayar kepada JP oleh plaintif di bawah perjanjian itu, termasuk harga tanah tersebut. Defendan dilantik oleh JP sebagai subkontraktor melalui surat penerimaan ('LOA') bertarikh 15 Februari 2007 untuk membina kerja struktur di bawah projek ini. Berlaku kelewatan di pihak JP dalam menyiapkan projek dan dengan itu, plaintif mengeluarkan surat penamatan kepada JP pada 13 Julai 2007. Selepas penamatan perjanjian, defendan enggan meninggalkan tapak projek. Plaintif memberikan notis kepada defendan untuk mengosongkan tapak projek dan seterusnya memaklumkan kepada defendan bahawa plaintif tidak akan membuat apa-apa bayaran kepada defendan selepas perjanjian tamat pada 13 Julai 2007. Defendan enggan mengosongkan tapak walaupun telah menerima notis. Oleh itu, plaintif kemudiannya memfailkan tindakan terhadap defendan melalui saman pemula ('OS') dan memohon, antara lain, satu perisytiharan bahawa ia pemilik tanah tersebut dan berhak mendapat milikan kosong tanah. Dalam membantah OS plaintif, defendan menghujahkan, antara lain, bahawa penamatan perjanjian antara plaintif dan JP adalah salah atas alasan bahawa representasi-representasi dibuat agar lanjutan masa diberikan kepada JP untuk menyiapkan projek tersebut. Defendan seterusnya mendakwa bahawa penamatan tersebut menyalahi undang-undang perjanjian kerana ia telah menyebabkan kerugian dan kerosakan kepada defendan kerana tidak dibayar satu sen pun untuk kerja yang dilakukan dalam projek ini. Defendan menghujahkan bahawa bayaran bagi kerja yang dilakukan di bawah LOA dilakukan secara berturut-turut, iaitu defendan akan dibayar hanya jika JP telah dibayar. Oleh itu, defendan membuat tuntutan balas terhadap plaintif bagi jumlah RM50 juta. Mahkamah Tinggi membenarkan permohonan OS plaintif. OS ini juga ditukar menjadi tindakan writ supaya tuntutan balas defendan bagi pampasan boleh diputuskan semasa perbicaraan. Semasa perbicaraan, defendan menghadkan tuntutan balasnya terhadap plaintif kepada satu jumlah RM3,009,254.23

seperti disahkan oleh arkitek JP ('DW2') di bawah tiga sijil sementara. Hakim bicara memutuskan bahawa oleh kerana tiada hubungan kontrak antara plaintif dan defendan, tuntutan balas defendan bukan satu tuntutan berkontrak tetapi satu tuntutan berdasarkan s. 71 Akta Kontrak 1950 ('AK'). Hakim Mahkamah Tinggi merujuk kes *Siow Yong Fatt v. Perlombongan Rotan Susur* ('kes *Siow Yong Fatt*') dan memutuskan untuk berjaya dalam satu-satu tuntutan di bawah s. 71 AK, empat syarat perlu dipenuhi iaitu melakukan tindakan tersebut atau penyampaian benda tersebut mesti (i) sah; (ii) dilakukan untuk orang lain; (iii) tidak sepatutnya dimaksudkan untuk dibuat secara sukarela; dan (iv) mestilah dalam keadaan di mana seorang lagi menikmati manfaat tindakan-tindakan atau penyampaian tersebut. Hakim Mahkamah Tinggi memutuskan bahawa defendan gagal memenuhi syarat (ii) dan (iv) untuk mewujudkan satu tuntutan di bawah s. 71. Berhubung dengan kuantum, Hakim Mahkamah Tinggi juga memutuskan defendan gagal melepaskan bebannya untuk membuktikan RM3,009,254.23 dan hanya bergantung pada tiga sijil sementara dikeluarkan oleh DW2. Hakim Mahkamah Tinggi seterusnya memutuskan bahawa defendan gagal memperihalkan kerja-kerja yang telah dilakukan oleh defendan dan butiran tuntutan yang sama. Oleh itu, rayuan ini. Atas rayuan, defendan menghujahkan bahawa Hakim Mahkamah Tinggi telah tersalah tafsir syarat (ii) dan (iv). Dalam mentafsir perkataan-perkataan dalam syarat (ii) 'must be done for another', hakim bicara memberi penekanan tidak berpatutan pada fakta bahawa memandangkan defendan akan dibayar oleh JP untuk kerja-kerja yang dilakukan, defendan gagal menunjukkan bahawa segala-galanya dibuat untuk plaintif. Hakim bicara terkhilaf apabila gagal memberi pertimbangan pada fakta bahawa walau apa pun kerja yang dilakukan di bawah projek dilakukan untuk prinsipal projek iaitu untuk plaintif, dalam kes ini. Berkenaan syarat (iv), hakim bicara juga membuat satu dapatan fakta yang salah iaitu 'oleh kerana kerja-kerja dilakukan untuk JP, JP yang telah memanfaatkannya dan bukan plaintif.'

Diputuskan (membenarkan rayuan dengan kos)
Oleh Lim Yee Lan HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 71 AK adalah penjelmaan berkanun prinsip common law *quantum meruit*, yang memperuntukkan pampasan yang adil sebagai penilaian kerja yang dilakukan, bertentangan dengan ganti rugi kontrak. Liabiliti di bawah s. 71 bukan berdasarkan apa-apa kontrak sedia ada antara pihak-pihak. Sebaliknya, ia berdasarkan prinsip berekuiti kelakuan yang disedari dan pengembalian untuk mengelakkan pengkayaan tidak patut oleh satu pihak dengan mengorbankan pihak lain. Hujahan bahawa tiada kewajipan oleh plaintif untuk membayar defendan untuk kerja-kerja struktur dilakukan kerana tiada priviti kontrak antara pihak-pihak tidak boleh kekal.

(2) Hakim Mahkamah Tinggi seolah-olah memberi satu tafsiran sempit atau sangat mekanikal kepada syarat kedua. Fakta senario kes ini sangat berbeza daripada kes *Seow Yong Fatt.* Semasa kerja-kerja struktur dibuat oleh defendan, ia secara fakta telah dilakukan untuk plaintif sebagai pemilik utama projek dan plaintif ialah benefisiari langsung projek. Defendan telah dimaksudkan untuk dibayar kerana menjalankan kerja-kerja. Fakta bahawa defendan akan menerima bayaran daripada JP dan bukan plaintif tidak mengubah fakta yang defendan tidak pernah berniat agar kerja dibuat secara sukarela. Oleh itu, syarat kedua sepatutnya diputuskan berpihak pada defendan.

(3) Defendan hanya dilantik sebagai subkontraktor untuk membina kerja-kerja struktur manakala pembinaan keseluruhan projek menjadi tanggungjawab JP. Plaintif mendapat manfaat daripada kerja-kerja struktur kerana plaintif telah menghidupkan semula projek itu dan melantik kontraktor baru untuk terus membina pangsapuri bagi kerja-kerja struktur yang telah dilakukan oleh defendan. Tiada bukti yang menunjukkan bahawa kerja-kerja struktur yang dilakukan oleh defendan adalah cacat dan/atau terpaksa dirobohkan apabila kontraktor baru mengambil alih projek tersebut. Tidak adil jika plaintif enggan membayar apa-apa pampasan kepada defendan untuk nilai kerja struktur yang dilakukan. Berdasarkan perkara di atas, defendan berjaya membuktikan, atas imbangan kebarangkalian, tuntutan di bawah s. 71 AK.

(4) Tuntutan defendan untuk jumlah RM3,009,245.23 berdasarkan tiga sijil sementara yang sah dan dikeluarkan oleh DW2, sebagai sebahagian daripada tuntutan bayaran di bawah syarat LOAnya dengan kontraktor utama, JP. Satu jumlah disahkan untuk bayaran interim berdasarkan terma kontrak tidak membentuk dasar pengiraan pampasan berdasarkan *quantum meruit* dalam satu tuntutan di bawah s. 71 daripada AK. Walau bagaimanapun, mahkamah mengambil kira bahawa dalam tiga sijil sementara tersebut, terdapat satu jumlah RM1,241,022.56 yang disahkan sebagai 'kerja fizikal sebenar yang dibuat. Defendan berhak menuntut jumlah tersebut sebagai pampasan berpatutan untuk kerja struktur yang dijalankan di tapak projek atas dasar *quantum meruit*.

(5) Dalam testimoninya, DW2 menyatakan bahawa tiga sijil sementara telah dikeluarkan olehnya selepas segala-galanya dinilaikan dan ditentusahkan oleh juruukur bahan ('DW1') JP. Kedua-dua keterangan DW1 dan DW2 tidak dicabar dengan serius oleh plaintif semasa perbicaraan. Oleh itu, jumlah RM1,241,022.56 bukanlah 'kerja fizikal sebenar yang dibuat' untuk satu angka yang dipetik secara rawak oleh defendan seperti yang didakwa oleh plaintif. Ia disediakan oleh orang yang mahir dalam profesion masing-masing dan Mahkamah Tinggi boleh menerima bahawa mereka bertindak profesional dalam

menjumlahkan dan mengesahkan pelbagai amaun yang dinyatakan dalam sijil tersebut, termasuk jumlah RM1,241,022.56 untuk kerja fizikal yang dilakukan oleh defendan.

(6) Dalam membenarkan rayuan defendan mengenai kuantum, hujahan defendan bahawa walaupun RM16 juta didakwa telah dibayar oleh plaintif untuk JP di bawah perjanjian, ia tidak termasuk kerja-kerja struktur yang dijalankan oleh defendan di tapak projek. Keterangan dokumentar yang dikemukakan oleh plaintif dengan sendiri menunjukkan bahawa RM16 juta telah dibayar kepada JP antara tempoh 19 Jun 2003 hingga 2 Februari 2005 manakala defendan dilantik oleh JP sebagai subkontraktor hanya pada 15 Februari 2007. Dalam erti kata lain, RM16 juta yang dibayar kepada JP tidak boleh termasuk bayaran untuk kerja-kerja struktur yang masih belum dilakukan oleh defendan pada masa itu. Oleh itu, defendan diawardkan sejumlah RM1,241,022.56.

Case(s) referred to:

Abu Mohammed v. Mohammed Kunju Lebba (1995) DMC 316 ***(refd)***
Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor [1991] 3 CLJ 2834; [1991] 2 CLJ (Rep) 294 HC ***(refd)***
Craven-Ellis v. Canons Ltd [1936] 2 KB 403 ***(refd)***
Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor [2014] 1 LNS 1075 CA ***(refd)***
Great Eastern Shipping Co Ltd v. Union of India AIR 1971 Cal 150 ***(refd)***
Kotah Match Factory Kotah v. State of Rajasthan, AIR 1970 Raj 118 ***(refd)***
Kumpulan Teknik Sdn Bhd v. Murad Hashim Communication Sdn Bhd & Anor [2012] 6 CLJ 80 HC ***(refd)***
Mulamchand v. State of Madhya Pradesh, AIR 1968 SC 1218 ***(refd)***
New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1986] 1 LNS 30 SC ***(refd)***
Pallonjee Eduljee and Sons v. the Lonavala City Municipality AIR 1937 Bom 417 ***(refd)***
Ramkrishna Shankarrao v. Rangoobai and anr AIR 1959 Bom 519 ***(refd)***
S&M Shopping Arcade Sdn Bhd v. Fui Lian-Kwong Hing Sdn Bhd [2003] 3 CLJ 58 HC ***(refd)***
Shen Yuan Pai v. Dato Wee Hood Teck & Ors [1974] 1 LNS 153 HC ***(refd)***
Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 1 LNS 161 PC ***(refd)***
Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd [2013] 1 LNS 729 HC ***(refd)***
Teh Ah Khoon Enterprise Sdn Bhd v. Puncakdana Sdn Bhd [2004] 1 LNS 558 HC ***(refd)***

Legislation referred to:

Contracts Act, s. 71

Contract Act [Ind], s. 70

For the appellant - S Ramesh; M/s Ramakrishnan & Assocs
For the respondent - Juraidah Abbas; SFC

[Editor's note: For the High Court judgment, please see Kerajaan Malaysia v. Tanjung Teras Sdn Bhd [2013] 10 CLJ 336.]

Reported by S Kahvitha

A

JUDGMENT

Lim Yee Lan JCA:

Introduction

B **[1]** This is an appeal by the appellant/defendant against the decision of the Kuala Lumpur High Court dated 28 February 2013 which dismissed the appellant/defendant's counterclaim for the sum of RM3,009,254.23 against the respondent/plaintiff.

[2] We heard the appeal on 13 August 2014, after which we adjourned the matter for consideration and decision. We now give our decision.
C

[3] In this judgment, the parties will be referred to as they were in the High Court.

Background Facts

D **[4]** The chronology of events leading to the counterclaim of the defendant can be summarised as follows:

(i) the plaintiff entered into a sale and purchase agreement dated 24 May 2003 ("the agreement") with a company known as Jeram Permata (Cheras Sdn Bhd) ("JP"), in which, in consideration of JP agreeing to
E sell a piece of land and constructing on the said land 226 medium cost apartments as staff quarters for the Jabatan Bomba Dan Penyelamat Malaysia (JBPM), under the Ministry of Housing and Local Government, the plaintiff will pay a purchase price of RM50,548,000 (out of which RM4.44 million represents the price of the said land) to
F JP ("the project");

(ii) a sum of RM16 million had been paid to JP by the plaintiff under the agreement, which included the price of the said land. The said land had since been transferred to the plaintiff and registered in the name of the Federal Lands Commissioner under a document of title known as
G HS(D):99285 Lot No. 5194 Mukim of Kuala Lumpur;

(iii) under cl. 27.1 of the agreement, the project must be completed by JP within 24 months from the date of the building plans approvals given by DBKL on 12 November 2004, which brings the completion date of the project to 11 November 2006;

H

(iv) there was delay on the part of JP in completing the project, despite seven warning letters issued by the plaintiff on various dates between 24 April 2006 and 14 November 2006;

(v) by a letter dated 21 May 2007, the plaintiff gave a notice of breach of
I the agreement to JP. The said notice further stated that if the breach is not remedied by JP within 30 days, the agreement would be terminated;

(vi) by a letter dated 13 July 2007, the plaintiff issued a letter of termination to JP;

(vii) the defendant was appointed by JP as its sub-contractor *vide* a letter of acceptance dated 15 February 2007 ("LOA") to construct the "super structure works" under the project (see AR jilid 2(2) (Bahagian C LOA on p. 276);

(vii) after the termination of the agreement, the defendant refused to leave the project site;

(ix) *vide* a letter dated 13 September 2007, the plaintiff gave a notice to the defendant to vacate the project site within 14 days of the letter and further informed the defendant that the plaintiff will not be making any payment to the defendant after the agreement was terminated on 13 July 2007. The defendant refused to vacate the site despite the notice;

(x) the plaintiff then filed an action against the defendant *vide* an originating summons ("OS") dated 12 October 2009 seeking the following reliefs:

(i) a declaration that it is the owner of the said land and is entitled to vacant possession of the said land;

(ii) a declaration that the defendant as the sub-contractor of the main contractor, JP, are trespassers on the said land after the agreement was terminated; and

(iii) an order that the defendant to vacate the said land within 14 days from the date of the court's order;

(xi) the defendant in its affidavit in reply opposed the plaintiff's OS on the ground that there were many disputes of facts which could be resolved only through hearing the oral evidence of witnesses under a writ. Amongst the disputed facts were whether the termination of the agreement between plaintiff and JP was wrongful as there were representations made by the plaintiff's agents from JBPA and the Ministry of Housing and Local Government to JP and the defendant that extension of time would be granted to JP to complete the project; whether there were representations made by the plaintiff's agents from JBPA and the Ministry of Housing and Local Government to the defendant that direct payment to the defendant would be made if the defendant could procure JP's architect's certificate to certify the work done. It was further alleged by the defendant that the unlawful termination of the agreement had jeopardised the defendant in the sense that payment to the defendant for work done under the LOA was on a back to back basis, ie, defendant would be paid only if JP is paid and

A the unlawful termination of the agreement had resulted in loss and damage to the defendant as it was not paid a single cent for the work done on the project for which the defendant intended to pursue a counterclaim of RM50 million against the plaintiff;

B (xii) in its affidavit in reply, the plaintiff averred, *inter alia*, that it had no contractual relation with the defendant and no approval was given to JP for the appointment of the defendant as a sub-contractor as was required under the agreement; that it was not aware of the appointment of the defendant as JP's sub-contractor and did not know the nature of the work the defendant was contracted by JP to carry out on the C project. The plaintiff also maintained that neither the plaintiff nor its representatives had at any time given any representation to the defendant that direct payment would be made if the defendant could procure the architect to certify the work carried out by it;

D (xiii) the defendant, in its affidavit in reply, while acknowledging that no consent was obtained by JP for the appointment of the defendant as its sub-contractor, maintained that the plaintiff was fully aware of the defendant's appointment as the defendant had to take instructions not only from JP but its architect, civil structural engineer, mechanical and electrical engineer, quantity surveyor and also the plaintiff's E representatives from JBPA;

(xiv) on 10 March 2010, the Kuala Lumpur High Court granted order in terms of the plaintiff's OS and the defendant, its workers and agents were ordered to vacate the said land within 30 days from the date of the order;

F (xv) the High Court also directed the defendant's counterclaim to go for trial and further directed that all existing affidavits filed by the parties in respect of the OS to stand as pleadings; and

(xvi) the counterclaim was heard before the present High Court Judge. G During the trial, the defendant confined its counterclaim against the plaintiff to a sum of RM3,009,254.23 as certified by JP's architect under three interim certificates.

Issues To Be Tried

H **[5]** During the trial parties had agreed to the two following issues to be tried:

(a) whether the plaintiff has an obligation under the law to pay the defendant as a sub-contractor for the works that have been completed on the said project;

I (b) if the answer to the first issue is in the affirmative, what are the sums due to the defendant?

Decision Of The High Court

[6] At the conclusion of the trial, the learned High Court Judge dismissed the defendant's counterclaim based on the following findings.

[7] In regard to the first issue, the learned trial judge accepted the submission of learned counsel for the defendant that since there was no contractual relationship between the plaintiff and the defendant, the defendant's counterclaim was not a contractual claim but a claim premised on s. 71 of the Contracts Act, which reads as follows:

> Section 71 - obligation of person enjoying benefit of non-gratuitous act.
>
> Where a person lawfully does anything for another, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[8] The Privy Council's decision in the case of *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161; [1967] 2 MLJ 118 ("Siow Wong Fatt") was referred to in which it was held that to succeed in a claim under s. 71 of the Contracts Act, the following four conditions have to be met:

> The doing of the act or the delivery of the thing:
>
> (a) must be lawful;
>
> (b) must be done for another person;
>
> (c) must not be intended to be done gratuitously;
>
> (d) must be such that the other person enjoys the benefit of the act or the delivery.
>
> (e) ...

[9] Based on the factual matrix of this case, the defendant had failed to fulfil the second and fourth conditions set out in *Siow Wong Fatt* to successfully establish a claim under s. 71.

[10] In regard to the second condition, it was held at para. 11 of the judgment as follows:

> 11. With respect to the 2nd condition, the Court has to consider whether the works were done by the Defendant for the Plaintiff or otherwise and the Court is mindful it must be considered "at the time that the act is done or the thing delivered". DW3, Tuan Haji Roshaizad bin Othman stated that the works were performed by the Defendant for JP and in consideration thereof, the Defendant will be paid by JP. Hence the Defendant has not fulfilled the 2nd condition to show that the works were done for the Plaintiff.

[11] Whereas for the fourth condition at para. 12 of the judgment as follows:

> 12. In relation to the 4th condition, since the works were performed for JP, it is JP who has benefited and not the Plaintiff. In consideration for the works done, the sum of RM50,548,000,00 will be paid to JP, out of which it is undisputed a sum of RM16,444,072.19 has been paid (Bundle B pp. 42-46, Bundle C pp. 136-160, Bundle D pp. 1-2).
>
> 12.1 DW3 stated that on numerous occasions the Defendant has requested to the Plaintiff or Plaintiff's agent to compensate the Defendant for the work done for which the Plaintiff had obtained benefit in that. The Plaintiff revived the project and appointed new contractors to continue to build the apartments on the "super structure works" done by the Defendant.
>
> 12.2 I find the Plaintiff has not benefited from the work done by the Defendant because the project was not completed and the Plaintiff had to appoint new contractors to complete the project when in fact it was an Agreement between Defendant and JP to build 226 units of apartments on behalf of JP.
>
> 13 ...
>
> 14. To sum up, I find the Defendant has not satisfied the 2nd and 4th conditions out of the 4 conditions spelled out in *Siow Wong Fatt* (*supra*) and therefore I am of the view that the Defendant's claim for compensation under s. 71 of the Contracts Act cannot be sustained.

[12] In regard to the second issue on quantum, it was held as follows:

> 16. The Defendant submitted on the issue of quantum through Kuh Cho Sen (DW1), a quantity surveyor attached to the firm of Juru Kos, appointed by JP in respect of the project and Ar Jason Low Chee Eng, an architect and partner of JLA/Architect, the firm appointed by JP as project architect. The Defendant submitted - (i) the witnesses testified based on Bundle E which contain the certificates determining the value of works done by the Defendant for the project, the valuation of works were done by the surveyor, and subsequently certified by the architect; (ii) it is undisputed that the total amount certified for Progress Claims No,1, 2 and 3 amounted to RM2,708,328.81; and (iii) the amount Defendant claimed is RM 3,009, 254.23, being the sum of RM 2,708,328.80 plus the retention sum of RM300,25.42.
>
> 17. Based on the Affidavits before the Court which were ordered by the Court to stand as pleadings when the Originating Summons was to a writ action, I agreed with the Plaintiff's submission that the Defendant did not particularise the works done by the Defendant and the particulars of claim in respect of the same. The Plaintiff has urged the Court to dismiss the Defendant's counterclaim of RM3,009,254.23 on account of this alone.

17.1. I am not inclined to do so because of the circumstances of this case in that there are no normal pleadings as in a normal writ action. It is not disputed that the Defendant's counterclaim was ordered to proceed to trial and the Affidavits are to stand as pleadings.

18. The burden is on the Defendant to prove its damages as per the principle in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p. 178 cited by His Lordship Arifin Zakaria J (as he then was) in *Kuantan Trading v. Syarikat Kilang Papan Pinang, Dungun, Terengganu Sdn Bhd* [1994]1 LNS 72.

18.1 The Plaintiff submitted the following items ought to be deducted from the RM3,009,254.23-

(i) Liquidated Ascertained Damages (LAD) calculated in this manner -

LAD (12.11.2006-13.7.2007) (244 hari)

= RM 3,379,099.88

1 hari LAD =RM 3,319,099.88/244

= RM 13,848.77

(1.5.2007-13.7.2007) (63 hari) = RM 12,84817 X 63 hari

=RM872,472.51

(ii) Preliminaries of RM1,354,184.50 as the Defendant was unable to give details of the breakdown for this amount.

(iii) Variation Order for RM205,412.90 as DW1 and DW2 agreed there was no order for variation given by the Plaintiff to the Defendant.

(iv) Material on site for RM267,446.25 as there was no proof of the same.

(v) Retention sum of RM300,925.42 ought to be deducted as DW3 agreed that the retention sum was held by JP and this sum has been deducted from the amount of RM 3,009,254.23 (Bundle B p. 25).

18.2 I accept the Plaintiff's submission that all the items (i) to (v) totaling RM3,000,441.58 have to be deducted from RM3,009,254.23 leaving a balance of RM 8,812.65.

The Appeal

[13] Before us, learned counsel for the defendant raised the following main issues:

(i) the learned judge erred in finding that the defendant had failed to prove its claim under s. 71 of the Contracts Act 1950 as laid down in *Siow Wong Fatt;*

A (ii) the learned trial judge failed to appreciate that a claim under s. 71 is premised on the equitable principle of restitution to prevent unjust enrichment to a party who had received goods or services from another party who, at the time of delivering such goods or services, did not intend it to be gratuitous (see: *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1986] 1 LNS 30; [1987] 2 MLJ 57 (SC), *Aw Yong Wai Choo & Ors v. Arief Trading Sdn Bhd & Anor* [1991] 3 CLJ 2834; [1991] 2 CLJ (Rep) 294; [1992] 1 MLJ 166 (HC) and *Kumpulan Teknik Sdn Bhd v. Murad Hashim Communication Sdn Bhd & Anor* [2012] 6 CLJ 80; [2012] 8 MLJ 572 (HC), *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218, *Great Eastern Shipping Co Ltd v. Union of India* AIR 1971 Cal 150 and *Kotah Match Factory Kotah v State of Rajasthan*, AIR 1970 Raj 118).

(iii) In *Aw Yong Wai Choo*, the plaintiffs were purchasers of houses developed by the first defendant under sale and purchase agreements entered into between the plaintiffs and the first defendant. The first defendant was unable to complete the project and the second defendant had carried on and completed the same. The court held that when the second defendant decided to take over the project and built the houses according to more expensive specifications, it did so in no way which could be conceivably unlawful. When it did so it did not intend it to be gratuitous. The plaintiffs had all gained and enjoyed the benefit of such specifications. Thus, the second defendant was entitled to claim the additional costs of the expensive specifications from the plaintiffs under s. 71 of the Contracts Act 1950;

(iv) in *Kumpulan Teknik Sdn Bhd*, the court held that a claim based on *quantum meruit* can be made for work done where the contract is terminated by breach. The party had obtained a benefit. The works were not intended to be done gratuitously, it would therefore be unjust for a party who has obtained a benefit to then refuse to make payment;

(v) in this case, the learned judge had misconstrued the second condition in s. 71 as laid down in *Siow Wong Fatt*;

(vi) in *Siow Wong Fatt*, the PC held that although the road was built by the first respondent (Susur Rotan), with the approval of the appellant (*Siow Wong Fatt*), it was done for Susur Rotan's own benefit because under the chain of contracts Susur Rotan was the body that was going to exploit the mineral land. This decision was not based on the fact of who ought to have paid Susur Rotan under the chain of contracts;

(vii) this is in contrast to the facts in our case which involved a construction project between the plaintiff as the employer, JP as the main contractor and the defendant as the sub-contractor of JP. The project encompasses the construction of 226 apartment units meant for the plaintiffs agent, JBPM, as its staff quarters by JP as the main contractor. JP in turn employed the defendant as its sub-contractor to construct the super structure work comprised in the project;

(viii) the learned trial judge in interpreting the words in the second condition "must be done for another" gave undue emphasis to the fact that since the defendant would be paid by JP for the works, therefore the defendant had failed to show that the works were done for the plaintiff;

(ix) the learned trial judge erred in failing to give consideration to the fact that whatever works that were done under the project were done for the principal of the project, the plaintiff in this case. The issue of who makes the payment to the defendant is an issue of contractual obligations.

(x) in regard to the fourth condition in s. 71, the learned trial judge again erred in wrongly interpreting the PC's decision in *Siow Wong Fatt*. In its judgment, the PC had clearly stated that "it is clear on the facts though the details are obscure and were never fully explored that Siow has benefited from the building of the road". In other words, the fourth condition in s. 71 had been satisfied. The PC went on to state that "if the other conditions of the section are satisfied, then compensation must be paid for that act if the person sued has enjoyed the benefit". The other conditions were of course the first, second and third conditions in s. 71. The PC held that Susur Rotan was not able to fulfil the second condition (that the work was done for another) because, at the time of the construction of the road, Susur Rotan had intended the road for its own benefit in order to enable it to exploit the mining land. The road was never intended for the benefit of the appellant (*Siow Wong Fatt*). Further, at the time of constructing the road, Susur Rotan did not look to any one for payment. It was under those circumstances that the PC held that it was not unjust for *Siow Wong Fatt* to retain the benefit of the construction of the road on the said mining land by Susur Rotan after the mining operations failed to materialise;

(xi) the facts in our case are totally different from the facts *Siow Wong Fatt*. Here the super structure work formed part of the works under the project for which JP had expected to be paid under the main contract. The defendant, as the subcontractor of JP, had also expected to be paid for the super structure work from the plaintiff through JP, its main contractor, on a back-to-back basis;

(xii) what is more important is that the project was constructed for the benefit of the plaintiff as staff quarters of its employees serving under the JBDPA. While it is true the project was not completed by JP, but it has since been revived and the new contractor had utilized the superstructure work done to complete the project. In other words, the defendant had fulfilled all the conditions in s. 71 as set out in *Siow Wong Fatt* to enable it to be paid a reasonable compensation for the super structure work done;

(xiii) up to the date of the counterclaim, the defendant had not received a single cent for the super structure work from JP. It was not denied that under the sub-contract the defendant was only entitled to receive payment from JP on a back-to-back basis, ie, the defendant would only be paid for work done if and after JP receives the payment for the work from the plaintiff. In this case, the plaintiff had failed to establish at the trial that JP had already been paid for the super structure work by the plaintiff through JP;

(xiv) in fact, the documents produced by the plaintiff during trial giving the breakdown of the RM16 million allegedly paid to JP under the project clearly showed that all the payments were made beginning from 19 June 2003 until 2 February 2005. On the other hand, the defendant was appointed by JP as its sub-contractor only on 15 February 2007. In other words, the RM16 million paid to JP could not have included payment for super structure work which was yet to be done by the defendant;

(xv) hence, the learned judge made an erroneous finding of fact when, in relation to the fourth condition, she found that "since the works were performed for JP, it is JP who has benefited and not the plaintiff. In consideration for the works done, the sum of RM50,548,000 will be paid to JP, out of which it is undisputed a sum of RM16,444,072.19 has been paid";

(xvi) with regard to the second issue relating to quantum, the defendant's claim against the plaintiff was for the sum of RM3,009,254.23 certified under three interim certificates dated 2 August 2007, 10 August 2007 and 19 September 2007. The said sum of RM3,009,254.23 was made up of RM2,708,328.81 which represents the value of work done and RM300,925.42 as refund of retention sum held under the sub-contract;

(xvii) the three interim certificates were issued by JP's architect (DW2) after the works were evaluated and verified by JP's quantity surveyor (DW1) in accordance with the procedure laid down in the LOA governing the payment of work done by the defendant. DW1's and DW2's oral testimony was not subject to serious cross-examination by the plaintiff;

(xviii) it was submitted that the defendant had therefore proven that the value of the work done by the defendant on the super structure work was RM3,009,254.23;

(xix) the plaintiffs witnesses, SP1 and SP2, during cross-examination had also not disputed the valuation and certification made by DW1 and DW2. The amounts certified in the three interim certificates were therefore binding on the plaintiff (see: *Shen Yuan Pai v. Dato Wee Hood Teck & Ors* [1974] 1 LNS 153; [1976]1 MLJ 16, *Teh Ah Khoon Enterprise Sdn Bhd v. Puncakdana Sdn Bhd* [2004] 1 LNS 558; [2004] MLJU 630 and *S&M Shopping Arcade Sdn Bhd v. Fui Lian-Kwong Hing Sdn Bhd* [2003] 3 CLJ 58; [2003] MLJU 203);

(xx) it was further contended that the learned trial judge erred in law and in fact when she acceded to the plaintiffs submission that it was entitled to deduct from the total sum of RM3,009,254.23 claimed by the defendant, the sums for (i) liquidated and ascertained damages (LAD) (RM872,472.51) purportedly incurred by JP as the main contractor for delay in the completion of the project; (ii) preliminaries (RM1,354,184.50), variation order (RM205,412.90) and materials on site (RM267,446.25) and (iii) retention sum (RM300,925.42), which left a meager sum of RM8,812.65 due to the defendant;

(xxi) the learned judge failed to consider that the plaintiff's submission was an attempt to introduce evidence of a set - off or counterclaim which was never pleaded in any of its affidavits in the OS and also defied the learned trial judge's own ruling on this issue at the commencement of the trial;

(xxii) the defendant had invested considerable time, money and effort in carrying out the super structure work for which it had not been paid a single cent by JP and the plaintiff. JP could not pay the defendant because the plaintiff had wrongly terminated the agreement and refused to pay JP for the work done by the defendant; and

(xxiii) the plaintiff had benefited from the super structure work for which neither JP nor the defendant had intended to be done gratuitously. It was thus inequitable and unjust for the plaintiff to refuse to pay the defendant for the work done. The plaintiff is therefore liable in law to pay the defendant the sum of RM3,009,254.23 pursuant to s. 71 of the Contracts Act 1950.

[14] Learned Senior Federal Counsel (SFC), on the other hand, in her submission, contended that no error either of fact or law had been committed by the learned High Court Judge to warrant any appellate intervention of this court, for the following reasons.

[15] Firstly, the plaintiff maintained its position that there was no contractual relationship between the plaintiff and the defendant to impose any obligation in law on the plaintiff to pay for the work done by the defendant.

[16] The contractual relationship under the agreement on the project was between JP and the plaintiff and any claim for payment for work done, if any, under the project was to be made by JP and not by the defendant.

[17] The defendant was appointed by JP without the approval or knowledge of the plaintiff and way after the contractual period under the agreement had expired, as admitted by DW3.

[18] The plaintiff had lawfully terminated the agreement after JP breached its contractual obligation to the plaintiff under the agreement for failing to complete the project within the contractual period.

[19] The plaintiff's witnesses, SP1 and SP2 had in their testimony denied the defendant's allegation that representation had been made to the defendant that the plaintiff would make direct payment to the defendant if it could procure the architect of JP to certify the work done by the defendant.

[20] Thus, the factual scenario in this case does not fall under the purview of s. 71 of the Contracts Act to allow the defendant to make a claim under that section. However, if this court is of the view that the defendant's claim falls to be governed by s. 71 of the Contracts Act 1950, the plaintiff submits that the learned High Court Judge was right in holding that based on the PC's decision in *Siow Wong Fatt*, the defendant had failed to satisfy the second and fourth conditions in s. 71 to successfully establish a claim under that section.

[21] In particular, in regard to the second condition, the learned High Court Judge was right in holding that whether the work was done for the benefit of the plaintiff had to be considered at the time the work was done. It was submitted that in this case at the time the work was done it was for the benefit of JP. This is because the defendant was the sub-contractor of JP and would receive payment from JP. The work was not done for the plaintiff but for the benefit of JP.

[22] In regard to the fourth condition, it was submitted that the learned trial judge was again correct in holding that the plaintiff has not benefited from the super structure work done by the defendant as the project was not completed and the plaintiff had to appoint new contractors to complete the project.

[23] In regard to the second issue on quantum, since the learned High Court Judge had decided the first issue in the negative, this issue did not therefore arise for consideration.

[24] Be that as it may, it was submitted that the learned High Court Judge was right to hold that the defendant failed to prove the quantum of its claim. This is because during the trial the defendant merely produced three interim certificates certified by JP's architect (DW2) as proof of the amount claimed.

[25] It was observed that no documentary evidence was adduced by DW2, the architect, to explain and support each item certified by him. What the court had before it were the bare figures stated in the three certificates.

[26] The learned trial judge had in fact earlier agreed with the plaintiff's submission and found that the defendant had failed to particularise the works done by the defendant and the particulars of the claim in respect of the same. In other words, the learned judge found that the defendant had completely failed to discharge its legal burden to prove the quantum of its claim. The learned trial judge ought therefore to have dismissed the defendant's claim on this ground alone, which unfortunately she failed to do so.

[27] It was submitted that even assuming that the amounts certified in the three interim certificates were binding on the plaintiff, the plaintiff fully agrees with the learned High Court Judge that there must be deducted from those amounts the five items stated in para. 18 of the learned judge's judgment and for the reasons stated in the said paragraph.

[28] In conclusion, for the above reasons, the plaintiff urged this court to dismiss the defendant's appeal with costs.

Our Decision

[29] Having read the written submissions and heard oral arguments of learned counsel for both parties, and having perused the appeal records, we are of the view that this appeal ought to be allowed on account of errors of fact and law on the part of the learned High Court Judge in arriving at her decision. We set out the reasons for our decision.

On The First Issue Of Liability

[30] The defendant's counterclaim against the plaintiff is for the sum of RM3,009,254.23 as the value of the super structure work done by the defendant under the project. The claim is premised on s. 71 of the Contracts Act 1950.

Juristic Basis Behind S. 71

[31] Section 71 is the statutory embodiment of the common law principle of *quantum meruit*, which provides for a just compensation as the measure of the work done as opposed to contractual damages (see: *Siow Wong Fatt*, *Craven-Ellis v. Cannons Ltd* [1936] 2 KB 403, *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* [2014] 1 LNS 1075; *Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd* [2013] 1 LNS 729; [2014] 8 MLJ 14).

[32] Liability under s. 71 is not based on any existing contract between the parties. Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party (see: *Ramkrishna Shankarrao v. Rangoobai and anr* AIR 1959 Bom 519; (1958) 60 BOMLR 459, *Abu Mohammed v. Mohammed Kunju Lebba* (1995) DMC 316 and *Pallonjee Eduljee and Sons v. the Lonavala City Municipality* AIR 1937 Bom 417; (1937) 39 BOMLR 835).

[33] In *Craven-Ellis v. Cannons Ltd*, it was held that:

> The obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law and not by an inference of fact from the acceptance of service.

[34] In *Ramkrishna Shankarrao v. Rangoobai*, it was held as follows:

> From a bare reading of the section it is clear that even if there is no contract for the performance of certain work and if the Plaintiff has done that work, without intending to do that work gratuitously, and the Defendant has enjoyed the benefits thereof, then the Defendant is bound to compensate the Plaintiff in respect of such work. The equitable principle underlying Section 70 of the Contract Act is that there should be no undue enrichment of one party at the cost of another. It is based on the principle of restitution which prevents unjust enrichment by one party. The learned Counsel for the Appellant invited my attention to some reported decisions on this point.
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> In: [1968] 3 SCR 214, *Mulachand v. State of MP*, it was held that the contract in that case was not a valid one. However, the relief was granted by invoking Section 70 of the Indian Contract Act. It was pointed out that under Section 70 of the Contract Act the juristic basis of the principle under this section is not founded on any contract or tort but it is based on quasi-contract.
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> In: [1970] 3 SCR 415, *P Dhunji Shaw v. Poona Municipality* the plaintiff was supplying goods to the Municipality for which there was no contract but it was held that under Section 70 of Contract Act when a person lawfully delivers to another and not intending to do so gratuitously is entitled to return of the goods or the payment of the value of the goods. Similarly in: [1978] 3 SCR 571, *Md Ishaq v. Iqbal & Md Ali & Company* it was also a case of Plaintiff's supplying some goods to the Defendants and there was no contract. The court spelt out an implied contract by conduct of the parties. That means there was supply of goods by the Plaintiff and its acceptance by the Defendants. Even in the present case, the Plaintiff has done some additional work and the Defendant has accepted and enjoyed the benefits of the same.
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> Similarly in: [1980] 3 SCR 893 *Union of India v. JK Gas Plant* the Supreme Court applied the principle underlying Section 70 of the Contract Act and granted the relief even though there was no valid contract. It was held that since the Defendant has enjoyed the benefit of the work done by the Plaintiff, he is bound to pay the full value of the goods.

[35] In *Abu Mohammed v. Mohammed Kunju Lebba* the court held as follows: A

> The Section indicates that there is no distinction between the grant of a benefit to another on request and a grant without request. In both cases the person who enjoyed the benefit has liability to recompense the grantor of the benefit and the only exception is that when the grant was intended as a gratis, the recipient has no legal liability. It is now well settled that B Section 70 is much wider in scope than the principles adumbrated in common law (*vide Gajapathy Krishna Chandra v. Sreenivasa*, AIR 1915 Mad 95).

[36] In *Pallonjee Eduljee and Sons v. the Lonavala City Municipality* the Bombay High Court held, *inter alia*, as follows:

> ... The important point to notice is that in a case falling under s. 70 the C person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for D compensation is made by one person against another under s. 70 it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution. In *Fibrosa v. Fairbairn* [1943] AC 32 Lord Wright has stated the legal position as follows: E
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> > ... any civilised system of law is bound to provide remedies for cases of that has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall F within a third category of the common law which has been called quasi-contract or restitution.
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> 6. In *Nelson v. Larholt* [1948] 1 KB 330 Lord Denning has observed as follows:
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> > It is no longer appropriate to draw a distinction between law and G equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or H tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires.
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> 7. Applying the principle to the present case, it is manifest that the appellant would have been entitled to compensation under s. 70 of the Indian Contract Act if he had adduced evidence in support of his claim. I

[37] Section 70 of the Indian Contract Act referred to in the three Indian cases is in *pari materia* with s. 71 of our Contracts Act.

[38] In the light of the decided authorities cited above on the jurisdic basis behind s. 71 of our Contracts Act, it is thus clear that the learned SFC's submission that there is no obligation on the part of the plaintiff to pay the defendant for the super structure work done because there was no privity of contract between the parties does not hold any water.

Conditions To Be Fulfilled In A Claim Under s. 71

[39] As rightly pointed out by the learned High Court Judge, in a claim under s. 71, the defendant is required to fulfil four conditions as set out in the Privy Council's decision in *Siow Wong Fatt* as set out above.

[40] The learned High Court Judge, having evaluated the factual matrix before her, came to the conclusion that the second and fourth conditions had not been met by the defendant to entitle it to make a claim under s. 71. We had earlier set out in detail the reasons for her findings on these two conditions.

[41] To understand the decision of the Privy Council in *Siow Wong Fatt*, it is pertinent to appreciate the facts in that case.

[42] The brief facts in *Siow Wong Fatt* as appeared in the headnotes read as follows:

> The appellant (Siow) made discoveries of a few hundred acres of land which gave promise of bearing iron ore. In November 1959 he obtained a prospectors licence and a mining lease was granted to him in September 1961. He then formed a company called the Kota Mining Co Ltd (hereinafter called "Kota") and transferred all the benefits and burdens vested in him to the company. By an agreement dated September 19, 1960 Kota transferred its right under the earlier agreements to the first respondent (Susur Rotan) in consideration of $40,000 and a further $40,000 was to be paid at a later stage (which was never paid) with a tribute of $2 for every ton raised. Thus by a train of sub-contracts Susur Rotan became entitled as a matter of substance to the benefit of the prospectors licence and a right to a mining sub-lease of the mineral land. Susur Rotan then as a commercial owners of the mining rights constructed a road eight or nine miles long leading to the mineral land. But despite that Susur Rotan never started to mine the land as it appeared that Kota did not carry out their part of the contract. Susur Rotan then sued Kota for specific performance of the agreement dated September 19, 1960 and they joined Siow as a defendant against whom they made a claim for specific performance of an alleged oral agreement. When the case came up before Azmi J, as he then was, counsel for Susur Rotan announced that the action between his client and Kota had been settled so that the action proceeded between Susur Rotan and Siow, and Azmi

> J held that there was no oral agreement as alleged and dismissed the action. Susur Rotan then appealed to the Federal Court who found against Susur Rotan upon the alleged oral agreement but in its favour under section 71 of the then Contracts (Malay States) Ordinance and directed an inquiry as to the sum to which Susur Rotan was thereby entitled ([1965] 2 MLJ 45). On appeal to the Privy Council the sole question before their Lordships was whether the Federal Court were right in holding that Susur Rotan had a valid claim against Siow under section 71 of the said Ordinance in respect of their expenditure upon the road.

[43] The PC had answered the sole question in the negative. Having set out the four conditions which must be fulfilled in order to establish a claim under s. 71, the PC went on to hold that based on the facts, Susur Rotan had failed to fulfil the second condition of the section. This is what the PC said in regard to this condition:

> It is the second point which in their lordships' judgment is decisive of this case. As a matter of phraseology the section seems clear upon it. To bring the section into play the person when doing the act or delivering the thing must do the act "for another person" or deliver something "to him". So that his then present intention must be to do the act or to deliver the thing for or to another.

[44] Relying on the words that the work must be done "for another person" or to "deliver something to him" and that intention must be gathered at the time the work was done or delivered, the learned High Court Judge went on to hold that since "DW3 had stated that the works were performed by the defendant for JP and in consideration thereof, the defendant will be paid by JP, hence the works were not done for the plaintiff but for JP", the second condition was not satisfied.

[45] We are unable to agree with the learned High Court Judge's reasoning on the second condition. She would appear to have given a very mechanical or narrow interpretation to the second condition. She had overlooked the observation made by the PC, in regard to the second condition, that at the time of the construction of the road, Susur Rotan was not doing it for the benefit of Siow but for its own benefit under the chain of contracts because it was the body that was going to exploit the mineral land. It was also clear from the facts that at the time of the construction, Susur Rotan was not looking to Siow or any one else for reimbursement of the costs involved.

[46] Coming back to the case before us, the factual scenario is very different from *Siow Wong Fatt*. The facts here were that (1) the project was built for and on behalf of the plaintiff to be used as the staff quarters of JBDPAN; (2) the project was undertaken by JP for the plaintiff under the agreement for which JP had expected to be paid under the agreement; (3) the super structure work was part of the works under the project; (4) JP had appointed the defendant as its sub-contractor to construct the super structure work; (5) the defendant had certainly expected to be paid for the super structure work by JP on a back-to-back basis.

[47] Having regard to the juristic basis behind s. 71 which is premised on the equitable principle of restitution, good conscience and prevention of unjustment enrichment, we hold as a matter of fact that at the time the super structure work was done by the defendant, it was done for the plaintiff as the ultimate owner of the project and the plaintiff was the direct beneficiary of the project. The defendant had intended to be paid for carrying the works. The fact that the defendant would receive payment from JP and not the plaintiff did not alter the fact that the defendant never intended the work to be done gratuitously. The second condition ought to have been found in favour of the defendant.

[48] We now come to the fourth condition. In this regard, we are again of the view that the learned High Court Judge erred in holding that as the whole project was not completed and the plaintiff had to appoint a new contractor to complete the project, the plaintiff had not benefited from the defendant's work.

[49] It must be borne in mind that the defendant was only appointed as a sub-contractor to construct the super structure work while the construction of the entire project was the responsibility of JP.

[50] DW3 had testified in Q&A 48 of his witness statement that the plaintiff had benefited from the super structure work as the plaintiff had since revived the project and had appointed new contractors to continue to build the apartments on the "super structure work" done by the defendant.

[51] There was no evidence on record to show that the super structure work done by the defendant was defective and or had to be demolished when the new contractor took over the project. Although at the commencement of the trial the plaintiff did seek to file in a supplemental bundle of document to enclose a Structural Integrity Test Report by IKRAM, to show defects in the work carried out under the project, it was disallowed by the learned High Court Judge after hearing submission of the parties. There was no cross appeal by the plaintiff on this ruling of the learned High Court Judge.

[52] Consequently, we agree with the defendant's learned counsel that the plaintiff could not deny that it had benefited from the super structure work done by the defendant. It would therefore be unjust for the plaintiff to refuse to pay any compensation to the defendant for the value of the super structure work done by the defendant.

[53] In conclusion, based on the foregoing discussions, we agree with the defendant that it had successfully proven, on a balance of probabilities, its claim under s. 71 to the Contracts Act.

On Quantum

[54] In regard to quantum, the learned High Court Judge had similarly found that the defendant had failed to discharge its burden of proving the sum of RM3,009,254.23.

[55] She had agreed with the plaintiff's submission that the defendant had merely relied on the three interim certificates issued by DW2 and had failed to particularise the works done by the defendant and the particulars of claim in respect of the same.

[56] The learned judge went on to hold that even if the defendant had proven its claim for the sum of RM3,009,254.23, the plaintiff was entitled to set-off the items mentioned in (i) to (v) totaling RM3,000,441.58 from RM3,009,254.23, leaving a balance of RM8,812.65 due to the defendant.

[57] The question is whether the learned High Court Judge had applied the correct principle in assessing a claim under s. 71 of the Contracts Act. As we had stated earlier, s. 71 of our Contracts Act is the statutory embodiment of the common law principle of *quantum meruit*, which provides for just compensation as the measure of the work done as opposed to contractual damages (see: *Siow Wong Fatt*, *Craven-Ellis v. Cannons Ltd* (*supra*), *Delpuri-Harl Corp JV Sdn Bhd v. Perbadanan Kemajuan Negeri Selangor* (*supra*); *Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd* (*supra*)).

[58] In *Siow Wong Fatt* this was stated so by the PC at p. 121 para. D-E of its judgment as follows:

> If the other conditions of the section are satisfied then compensation must be paid for that act if the person sued has enjoyed that benefit.
>
> That compensation must *prima facie* be measured by the worth of the act done. Whether or not it ought to be modified by an assessment of the benefit enjoyed is not a matter which their lordships propose to discuss in this judgment.

The words "compensation must be measured by the worth of the work done" implies a *quantum meruit* formula.

[59] In *Spatial Ventures Sdn Bhd*, the plaintiff's claim to be paid professional fees based on the scale costs in the letters of appointment was rejected by Nallini Pathmanathan J (now JCA), on the ground that reference to the scale in the contract or on the contract price of the project is not a tenable basis on which to assess or award damages on a *quantum meruit* basis. The learned High Court Judge gave the following rationale for her findings as appeared in paragraphs of her judgment:

> The Law on *Quantum Meruit*
>
> [24] The position in law is that an assessment for restitution on the basis of *quantum meruit* is in reality a measure of the costs of the work done, a matter which does not depend upon the contract and therefore will not be trammeled or limited by the contract rate. This gives the plaintiff, not contractual damages, but restitution for the work done.
>
> [25] It follows from the foregoing that the Plaintiff cannot seek to recover damages on *quantum meruit* basis by reference to the scale in the contract or on the contract price. Therefore the Plaintiff's claim premised on the

A scale costs in the letters of engagement is not a tenable basis on which to assess or award damages and accordingly the said basis, in accordance with the law, is rejected.

Assessment on a a *Quantum Meruit* Basis

B [26] It follows from the foregoing that the court has to consider the following issues in assessing work done:

a. What as a matter of fact is the work done?

b. How is the work done to be measured?

C **[60]** Reverting to the present case before us, the defendant's claim for the sum of RM3,009,245.23 is premised on the three interim certificates certified and issued by DW2 (JP's architect), as part of its progress payment claim under the terms of its contract (LOA) with the main contractor, JP. Based on the decision in *Spatial Ventures Sdn Bhd*, to which we fully adopt, it is thus obvious that a sum certified for interim payment based on D contractual terms cannot form the basis of calculation of compensation based on *quantum meruit* in a claim under s. 71 of the Contracts Act.

[61] Be that as it may, we took note that in the three interim certificates there was a sum of RM1,241,022.56 certified as "actual physical work done". Is the term "actual physical work done" equivalent to "the value of E the work done" or "costs of the work done" as envisaged in *Siow Wong Fatt* and *Spatial Ventures Sdn Bhd* to entitle the defendant to claim the said sum as reasonable compensation for the super structure work done on the project site on a *quantum meruit* basis?

F **[62]** We are of the view that the above question should be answered in the affirmative. This is because, unlike the case of *Spatial Ventures Sdn Bhd* where the assessment of damages before the Registrar was entirely by way of affidavit evidence and there were no cross-examination of the affidavits filed by the parties, in this case, DW2, JP's architect, and DW1, JP's quantity surveyor, were called by the defendant and were cross examined by the G plaintiff's counsel. DW2 had in his testimony stated that the three interim certificates were issued by him after the works were evaluated and verified by DW1, JP's quantity surveyor. Both DW1's and DW2's testimony was not seriously challenged by the plaintiff during trial. Hence, it was not as if the sum of RM1,241,022.56 for "actual physical work done" was a figure H plucked from the air by the defendant as alleged by the plaintiff. It was prepared by men skilled in their respective profession and the court could accept that they had acted professionally when quantifying and certifying the various amounts stated in the certificate, including the sum of RM1,241,022.56 for physical work done by the defendant.

I

[63] In the circumstances of this case, this court takes the view that on a balance of probabilities and in the interest of justice, the sum RM1,241,022.56 certified in the three interim certificates under the component of "actual physical work done" should be accepted as the value of work done by the defendant on a *quantum meruit* basis.

[64] In allowing the defendant's appeal on quantum, we have also accepted the defendant's contention that although a sum of RM16 million had purportedly been paid by the plaintiff to JP under the agreement, it did not include the super structure work carried out by the defendant on the project site. Indeed, the documentary evidence adduced by the plaintiff itself showed that the RM16 million was paid to JP between the period 19 June 2003 to 2 February 2005 whilst the defendant was appointed by JP as its sub-contractor only on 15 February 2007. In other words, the RM16 million paid to JP could not have included payment for super structure work which was yet to be done by the defendant at the relevant time.

[65] In conclusion, based on the foregoing findings and conclusion, we hereby allow this appeal with costs and set aside the decision of the High Court Judge. The defendant is awarded the sum of RM1,241,022.56 as reasonable compensation for the super structure work carried out on the project site. The sum awarded to carry interest at the rate of 5% from the date of this judgment until the date of full realisation.

[66] The defendant is awarded agreed costs of RM30,000 and deposit is to be refunded to the defendant.